No. 13606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and the Use of Westinghouse Electric Supply Company, WM. RADKOVICH COMPANY, INC., *et al.*
Appellees.

APPELLANT'S REPLY BRIEF.

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I.

Ancillary Jurisdiction of the Radkovich Cross-Claim.

The argument of Appellees is that the action against Woolley was ancillary to the main action and consequently needed no independent jurisdictional grounds and that therefore a cross-claim against Woolley was authorized by Rule 13g and hence Glens Falls could be brought in under Rule 13h.

They cite the *Par-Lock* case.* This case is not authority for the idea that in such an action, litigation concerning

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**United States to the Use and Benefit of Par-Lock Appliers of N. J. v. J. A. J. Const. Co., et al.* (D. C. E. D. Pa., 1943), 49 Fed. Supp. 85, affd. 137 F. 2d 584.

the subcontract is ancillary. Diversity existed between the litigants in the *Par-Lock* case, so the question was simply a question of joinder and not of jurisdiction.

Appellees concede that the *Westinghouse v. Woolley* part of the action is founded upon private contract. But they assert that no independent jurisdictional facts need to be alleged or need to exist. They argue that the *Westinghouse v. Woolley* part of the action is ancillary to the Miller Act suit. It is not ancillary because of Rule 13, since it is not a cross-claim or counterclaim. It is a part of the main action.

Appellant asserts that the action against Woolley is not necessary for complete relief under the Miller Act. The case at bar sufficiently demonstrates the fact, for Westinghouse stepped out of the case immediately because all parties conceded its right to be paid by Radkovich and Radkovich's sureties, as principal and sureties, respectively, on the Miller Act bond. The remaining question is whether the action thus brought can operate as a vehicle to permit adjudication of other quarrels which normally should be litigated in the State Courts.

The fact that the claim against Woolley is actually a collateral matter is exemplified by the fact that the trial court didn't even bother to enter a judgment against Woolley. This has not disturbed Appellees in the least. In fact, it probably has never even been noticed. Could it be that this action on another contract obligation is so closely related to the main action as to require its adjudication whether independent grounds of jurisdiction exist or not? We think that the obvious answer is, no. It was so unimportant and collateral that it was lost in the shuffle.

It would appear, therefore, that Appellant's analysis of Woolley's position in the action has not been impeached. Jurisdiction over this phase of the case depends upon diversity which was neither alleged nor proved. Insofar as Appellees' claim that Rule 13 authorizes the action against Glens Falls is concerned, the claim falls for want of jurisdiction when it appears that there is no jurisdiction for plaintiff's claim against the co-party thus sued pursuant to Rule 13g (Woolley) and there is no place for application of Rule 13h.

We invite the court's attention to *New Orleans Public Belt R. Co. v. Wallace* (C. C. A. 5, 1949), 173 F. 2d 145, 148, and quote from page 148:

> "Left for consideration is the correctness of the ruling of the court below in dismissing the cross-claim, but that consideration will not be extensive, for at the very outset, we find it unnecessary to pass upon that question: No cross-claim could be asserted against T. Smith & Son, Inc., by its codefendant, Public Belt Railroad Commission, because obviously the trial court had no jurisdiction of the claim asserted by the complainant against T. Smith & Son, Inc. As heretofore pointed out, the cause of action against the Belt Railroad arose under the Federal Employers' Liability Act; that against T. Smith & Son, Inc., arose under the tort law of Louisiana. All parties are citizens of Louisiana. Referring to the general rule that a federal court having acquired jurisdiction by reason of a substantial federal question involved has the right to decide all questions in the case, the Supreme Court in *Hurn v. Oursler,* 289 U. S. 238, 245, 53 S. Ct. 586, 589, 77 L. Ed. 1148, said:

> "'* * * the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the nonfederal ground; in the latter it may not do so upon the nonfederal cause of action.'"

See also, *O'Brien v. Richtarsic* (D. C. W. D. N. Y., 1941), 2 F. R. D. 42, 45, wherein the court states:

> "Further, this court had no jurisdiction of the suit pending when this third party order was granted, since there was no diversity of citizenship The court having no jurisdiction, it could not grant authority to serve any process."

There can be no further application of Rule 13; so our attention should be directed to Rule 14 concerning third-party practice. The *Westinghouse v. Woolley* phase of the action has no connection with this discussion unless the argument is that pursuant to Rule 14, the so-called Radkovich cross-claim (in reality a third-party claim) is ancillary to that phase of the case. In such event, it is subject to the infirmity already pointed out.

The only other consideration is whether the court has acquired jurisdiction over the Radkovich cross-claim be-

cause it is ancillary to the Miller Act action of Westinghouse.

Appellees cite the following language from Barron and Holtzoff (Vol. 1, Sec. 427, p. 865):

> "The third-party complaint need not state any grounds of jurisdiction if the court already has jurisdiction of the principal action and the third-party claim needs no new grounds of jurisdiction to support it. Otherwise such grounds must be stated."

More simply stated, if the third-party claim needs no new ground of jurisdiction to support it, none need be alleged. This is only common sense. The question remains as to whether it does or does not need independent grounds for jurisdiction.

If the third-party claim is ancillary to the main action, it needs no independent grounds for jurisdiction. Appellant asserts that it is not ancillary and Appellees assert that it is. Appellees discuss the problem in their Reply Brief in connection with Rule 13. It is difficult therefore to trace the argument as it relates to Rule 14 alone.

However, the argument is predicated upon the assumption that Westinghouse would not be able to recover under the Miller Act without proof of the subcontract and that, therefore, all of the issues are the same. This concept is set forth in italics on page 11 of the Reply Brief. This is not the law. 40 U. S. C. A. 270b, provides in its essential part:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expira-

> tion of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit. . . ."

In the case at bar, the court allowed Westinghouse to recover for the material which it furnished which went into the so-called extras which the court expressly found were not within the compass of the subcontract. No one interposed objection. If Appellees are right in their argument, where is the authority for this portion of the judgment?

All that the law requires is proof that the materials furnished by the plaintiff were consumed in the prosecution of the work required by the prime contract. The subcontract has no legal significance in the proof of the required facts. The Government is not concerned with where the prime contractor obtained labor and materials or how or by whom or by what authority they were obtained and installed. The Government is simply concerned with furnishing a means for assuring payment to the suppliers of labor and materials consumed in the prosecution of the work.

The question is one of jurisdiction which is governed by principles independent of the rules (*American Foman Co. v. United Dyewood Corporation* (D. C. N. Y. 1938), 1 F. R. D. 171; *Sewchulis v. Lehigh Valley Coal Co.* (2d Cir., 1916), 233 Fed. 422). The rules themselves so provide (see Rule 82). This is the starting point for all considerations of problems of jurisdiction.

Appellees have not fully comprehended our argument on this matter. Appellant does not say that a matter must be ancillary before Rule 14 applies thereto. There are doubtlessly many applications, of the rule where jurisdiction is unquestioned. Wherever there are independent jurisdictional grounds, no one could question the effectiveness of this procedural rule. But where there are no independent grounds for jurisdiction, the legal problem must be ancillary to the main case before any party may be brought in pursuant to Rule 14.

On pages 15 through 30 of the Reply Brief, Appellees actually argue that any person who is not a party to the action, who is or may be liable to a defendant for all or part of plaintiff's claim against him, may be brought into the action, pursuant to Rule 14 without regard to any jurisdictional requirements. Rule 14, Appellees insist, is sufficient authority that where the circumstances mentioned in the rule exist, there are no other jurisdictional requirements or that all jurisdictional requirements may be ignored. Appellant asserts that Appellees' argument disregards Rule 82 and construes Rule 14 in a manner which, if it permits the Radkovich cross-claim, enlarges the jurisdiction of District Courts.

The Westinghouse claim is solely on the Miller Act bond against the principal and sureties thereon. Any claim against Glens Falls must be based, if at all, upon entirely separate contractual obligations. We have discussed the proof required to recover under the Miller Act. Witness the different and additional issues, none germane to the Miller Act, posed by this appeal. It is virtually a fact that the two cases were tried separately, for Westinghouse attended the trial only briefly at its inception.

The only real triable issues were posed by the so called Radkovich cross-claim against Appellant Glens Falls.

The effect of the differences between the main action and the Radkovich cross-claim is two-fold: (1) The Radkovich cross-claim is not authorized by Rule 14 because the third-party defendant, Appellant Glens Falls, could not be liable for any of the Westinghouse claim against Radkovich and sureties. The liability of Glens Falls, if any, is dependent upon obligations and turns upon issues which are not involved in the principal action. (2) The third-party claim is not ancillary to the principal action because it is in no sense auxiliary thereto or dependent thereon. In fact the legal issues of the respective actions are hardly germane to one another. Jurisdiction is therefore lacking because there is no independent jurisdictional basis.

The new Federal Rules of Civil Procedure were designed and adopted to expedite and improve the administration of justice. The doctrine of ancillary jurisdiction finds its roots in the same soil. But in the case at bar Appellees seek to apply these principles in a manner which, if permitted, would deflect the purposes mentioned to the accomplishment of injustice.

As pointed out in the Opening Brief, the Glens Falls payment bond is an indemnity bond against loss and not against liability. The California law on this distinction is statutory and explicit. A cause of action on an indemnity against loss only arises after the loss has been suffered by the obligee (Radkovich). It does not arise simply by the obligee's becoming liable on a judgment. (See Op. Br. pp. 61 and 65.) Appellees argue, however, that the application of Federal Procedure to this situation "accel-

erates" the cause of action or liability of Glens Falls. (Rep. Br. pp. 24-30.) The effect of the argument is that by Federal Judicial process (contrary to the result of an action in the State Courts) the contract between the parties has been converted from an indemnity against loss (as it was written) to an indemnity against liability. Or, the effect of the argument is that the Federal Courts may and should ignore the substantive law of the State of California as declared by the Legislature and the Courts of the State to apply such rules as may seem expeditious.

As a practical matter, the obligee (Radkovich) may never suffer any loss by payment on account of the *Westinghouse* action. Bankruptcy of Radkovich could discharge the liability resulting from the *Westinghouse* action and such bankruptcy could stem from other causes or, being a corporation, it could simply be broke and out of business without payment. There would, therefore, be no loss and no cause of action would ever accrue against Glens Falls. It is unjust to change this contract by procedural maneuver.

It is not only unjust, but illegal, to construe the rules in a manner which alters the substantive rights of any litigant. See the statute authorizing the Supreme Court to prescribe the rules, 28 U. S. C. A. 2072 (formerly 28 U. S. C. A. 723(b)), which provides in part:

> "Such rules shall not abridge, enlarge or modify any substantive right . . ."

See *Brown v. Cranston* (2d Cir., 1942), 132 F. 2d 631, 148 A. L. R. 1178, holding that Rule 14 cannot be invoked to circumvent the New York statute on contribution among joint tort feasors which requires that a money

judgment must first be recovered before any action for contribution may be commenced. The decision relies in part upon the analysis of Professor Moore who acknowledges that jurisdiction is a prerequisite to application of the rules.

See also:

Contracting Division, etc. v. New York Life Ins. Co. (2d Cir., 1940), 113 F. 2d 864, 865.

The following authorities support Appellant's argument. *Herrington v. Jones* (E. D. La. 1941), 2 F. R. D. 108, cited in the Reply Brief, pages 15 and 17, holds:

> "Whilst, unquestionably, the weight of authority is that an independent basis of jurisdiction is not necessary to support a third party claim, and the making of L. J. Massart a third party defendant by the original defendant L. C. Jones, as third party plaintiff, was justified, it must not be forgotten that this was so only because the cause of action set up by the third party plaintiff was ancillary or auxiliary to the cause of action pleaded against him by plaintiff Herrington."

The court recognized that it was the ancillary or auxilliary nature of the action that conferred jurisdiction. It was not Rule 14 that did so.

Sussan v. Strasser (E. D. Pa., 1941), 36 Fed. Supp. 266, cited in the Reply Brief, pages 15 and 17, has nothing to do with indemnity nor insurance agreements and is miscited. The case involved a collision between two automobiles. Plaintiff who was a passenger in the automobile of the third-party defendant sued the driver of the other vehicle.

The case of *O'Brien v. Richtarsic* (D. C., W. D., N. Y., 1941), 2 F. R. D. 42 (cited in the Reply Brief at p. 17) cites District Court cases which simply state that a third-party claim does not need independent jurisdictional grounds for support and then cites the District Court cases and one Circuit Court case holding that jurisdiction must be tested by substantive law and then continued with the following helpful and analytical discussion at page 44:

> "It is clear that the only ground on which jurisdiction herein can be sustained is that the claim is ancillary and not open to the jurisdictional objection.
>
> "The law is well established that 'Principal jurisdiction involves and carries along with itself power over matters that can properly be regarded as accessorial. * * * And by virtue of this principle the District Court has jurisdiction of many matters as ancillary over which there would be no jurisdiction, were these matters independent and standing alone.' *Loft, Inc. v. Corn Products Refining Co.,* 7 Cir., 103 F. 2d 1, 10 (quoting Dobie on Fed. Procedure); *Venner v. Pennsylvania Steel Co.,* D. C., 250 F. 292; *Eichel v. United States F. & G. Co.,* 245 U. S. 102, 38 S. Ct. 47, 62 L. Ed. 177; *Pell v. McCabe,* 2 Cir., 256 F. 512; *Wilson v. United American Lines,* D. C., 21 P. 2d 872. Webster defines ancillary as 'designating or pertaining to a document, proceeding * * * that is subordinate to, or in aid of, another primary or principal one; as an ancillary attachment, bill, or suit presupposes the existence of another principal proceeding.' 1 Bouvier's Law Dictionary, Rawle's Third Revision, p. 194, defines ancillary as 'auxilliary.' 'subordinate.' In *Pell v. McCabe, supra* (256 F. 515), 2 Cir., certain rules of determination were laid down. So far as could be relevant here two

only need be given consideration. The ancillary process must be 'to aid, enjoin, or regulate the original suit. * * * To prevent the relitigation in other courts of the issues heard and adjudged in the original suit, * * *.' The cases last cited uniformly hold that ancillary jurisdiction in effect presupposes jurisdiction over the suit. Otherwise a claim could not be ancillary, and, of course, no jurisdiction be obtained.

"While the third party claim sets up a separate cause of action from that in the original complaint, the transactions involved in both complaints are the same, and it seems to me the clearly expressed intent of the Federal Rules of Civil Procedure is that such claims might be joined as 'in aid of the original suit' and 'to prevent relitigation of matters related to the same transaction,' and that, therefore, the third party claim is ancillary."

The holding of the court in the above quotation was included for completeness of quotation, but the facts were not stated, so the court's conclusion is of no assistance.

The case of *Glens Falls Indemnity Company v. Atlantic Bldg. Corp.* (C. C. A. 4, 1952), 199 F. 2d 60, involves the question of subrogation as a matter of right established by law. There is no question of infringement of the substantive rights of the parties since as the court points out the question is procedural. There are many other cases cited by Appellees, none of which add substantially to the force of Appellees' argument nor detract from the argument of Appellant.

II.

The Radkovich Cross-Claim Is Defective.

A. Allegations of Liability of Glens Falls Are Lacking.

Appellees' answer to the argument of the Opening Brief that this cross-claim does not state a claim upon which relief can be granted is placed upon three grounds principally: (1) That the claim need not state facts to constitute a cause of action as these terms are accepted in the State Courts; (2) That trial of the case cures all defects; and (3) Findings of the court cure such defects.

As to the first point, suffice it to say that this does not relate to Appellant's claim that the claim must in some way allege liability of the defending party. As to the other two points, Appellant asserts that Rule 15b is not intended to permit the court to adjudicate matters when no claim at all has been stated and that question is never settled by the trial court's findings since it is a question of law which may be raised at any point in the proceedings.

B. Allegations of Performance of the Subcontract Are Lacking.

It is apparent that Appellees concede that allegations of performance of the subcontract are lacking from the cross-claim. The question is, does the cross-claim state a claim upon which relief may be granted? We respectfully submit that discussion of the evidence and of the findings is entirely outside the issue.

However, Appellees do not accurately state the facts which they discuss. There is no covenant in the sub-

contract that Woolley would pay for materials and none is to be implied because Radkovich sought to protect himself from loss on this account by a payment bond. Failure of Woolley to pay Westinghouse is no breach of contract, nor is the action one for breach of contract.

What is true of the subcontract is also true of the performance bond. There is no provision requiring Woolley to pay for materials used and none may be implied for Radkovich required and received a payment bond to protect him from loss to Radkovich on this account. As soon as Appellees turn their attention to insisting that the two bonds should not be construed together, they embrace Appellant's argument on this subject. Quoting Appellees' Reply Brief, page 75:

> "Also, the reasons for the conditions in the performance bond, and the absence of conditions in the payment bond are equally obvious. What Glens Falls guaranteed by the performance bond was the performance of the work of the subcontract by Woolley."

The findings do not settle these issues. They follow the format of the cross-claim. These very findings are in part the foundation for the appeal. Appellant points out that they are erroneous, insufficient, inherently inconsistent with one another, are not supported by the evidence, and fail to support the conclusions of law and judgment. They do not in any way aid in answering the objections raised by Appellant.

Wherever there are conditions precedent to recovery upon a contract, the duty of alleging and proving performance thereof devolves upon the plaintiff, even though these same conditions may properly appear as special de-

fenses. The court must support its judgment by affirmative findings that such conditions have been performed. Finding XVIII [R. 201] does not do this. While Appellant effectively demonstrates the error of this finding, the issue at this point is, did Appellees allege performance of such conditions and the answer is, no. No authority has been cited to contradict Appellant's claim that such allegations in the claim are essential.

C. Allegations That a Loss Had Been Sustained Which Allegations Are Prerequisite to Recovery on the Payment Bond Are Lacking.

Again, there is no question but that the allegation which Appellant says is essential to state a claim is simply not there. As already discussed in this brief, Point I, the Federal Rules of Civil Procedure cannot be used as a device to alter, modify or impair the substantive rights of litigants so the theory of "acceleration" or conversion of the payment bond from an indemnity against loss to an indemnity against liability is untenable. Consequently, an allegation of loss is required to state a claim.

There is no ambiguity in the payment bond, so the cases cited on page 38 of the Reply Brief are inapplicable.

D. The Objection of Failure to State a Claim Upon Which Relief Can Be Granted Is Never Waived.

Whether a claim is stated upon which relief may be granted is a question of law. This objection does not raise an issue as to burden of proof and no findings of fact of the trial court can affect the objection one way or the other and any conclusion of law on the matter by the trial court is subject to review by appellate courts.

III.

As to Liability on the Payment Bond.

(This point is responsive to Reply Brief, Point III, pp. 41-45 thereof.)

This point in the Reply Brief contains discussion of ambiguous indemnity agreements, but no ambiguity in the bonds in issue has been pointed out, so the discussion and *Alberts v. American Casualty Co.* (1948), 88 Cal. App. 2d 891, have no application. We have already answered Appellees' argument that the bond in question has been converted into a bond against liability. It may be well to note the concession on page 45 that Appellant's argument may have significance in the State Courts. We understand that the Federal Courts are supposed to apply the same law. It is also worthy of note that the deficiencies of the evidence and ambiguities of the findings pointed to by Appellant in the Opening Brief are not supplied in the Reply Brief.

IV.

The Material Alterations of the Subcontract.

(This point is in response to Reply Brief, Point IV, pp. 46-68 thereof.)

Appellant's principal criticism of the argument of the Reply Brief is that it does not consistently follow one course. For example, the consequences of construing the two bonds together are confused with the consequences of construing them as independent of each other. The elements of one argument may be likened to the pieces of a jigsaw puzzle. The elements of one argument if properly put together present the whole picture. And like the jigsaw puzzle, parts borrowed from a different argument,

a mutually exclusive argument, confuse the picture. There is no short way to point to each instance of such confusion. Appellant will not attempt to do so.

A. There Is a Distinction Between an Authorized Modification and an Alteration of Contract.

Appellant has pointed to alterations of contract and to the law that such alterations exonerated the surety. We do not speak of authorized modifications as expressly provided for in paragraph 5 of the subcontract [R. 46]. There were no authorized modifications and Appellees point to none. The alterations complained of were unauthorized and not pursuant to the provisions of the subcontract. The waiver of notice of modifications of the contract did not refer to unauthorized alterations not authorized by the subcontract.

We read the statement on page 47 of the Reply Brief that if the bonds are construed separately, Glens Falls has consented to the alterations specified by Appellant, but see no support in the record or logic for the statement which does not follow from the argument preceding it.

The argument on page 48 of the Reply Brief is burdened with the difficulty heretofore mentioned. Radkovich required Woolley to perform as he did. Radkovich is the obligee on both bonds. If the contract was altered, it was by the act of the obligee. This is clear from the statement of facts, which was accepted by Appellees, as amply supported by reference to the record. It matters not what contrary finding the trial court made. It is Appellant's contention that contrary findings were unsupported by the evidence. This is not an attempt to persuade the appellate court to reweigh conflicting evidence. The only evidence is contrary to the findings and the

findings are opposed to each other. If not impeached by the evidence they are impeached by each other.

The trial court found that all of Woolley's materials obtained from Westinghouse and all of Woolley's materials obtained from Radkovich (and these were the two sources from which Woolley obtained materials) went into the subcontract. The court also found that $8,277.67 worth of labor and materials furnished by Woolley went into the work but not into the subcontract work but were extras. These were obtained by Woolley from Westinghouse or Radkovich. Note the conflict. The court found both that all of these materials went into the subcontract and that a substantial part thereof did not. It can't be both. Appellant asks, "Which?" It is the duty of the trial court to resolve conflicts in the evidence, if such exist. Appellees avail themselves of the convenience of being on both sides—citing a finding on one side to support one argument and a finding on the other side to support an inconsistent one.

B. Alteration of the Subcontract by Imposition of Extras.

Appellant is satisfied that the Opening Brief adequately demonstrates that the subcontract was altered by the so-called extras and that since no evidence not discussed in the Opening Brief is mentioned in the Reply Brief, there is nothing to show that findings were supported by the evidence. It should be observed, however, that Woolley did not claim that the so-called extras were anything but additions to his subcontract. Mr. Radkovich said that they were within the terms of the original subcontract. Woolley said that they were additions to it. This was the conflict. It was the court's own idea that these extra items were a thing apart from the subcontract and this idea has no support in the evidence.

C. Whether the $4,000.00 Payment Was a Loan or an Advance, There Was Still a Payment to Woolley in Excess of the Amount He Had Earned.

Based upon the discussion in the Opening Brief, a tabulation of the payments and earnings excluding the $4,000.00 results in a prepayment of $5,063.34. This is neither a matter of juggling figures nor of asking the court to reweigh the evidence. It is a simple analysis of all of the available evidence. It is not a matter of conflict therein, but resolution thereof. This is the duty of the trial court. Finding XVIII [R. 200] doesn't resolve the issue.

Was there a prepayment, is the question. What was due each month is another matter. The evidence clearly indicates a prepayment, but the court did not find as to whether there was or was not a prepayment. Appellant is entitled to such a finding.

Whether the $4,000.00 was a loan or a discounted prepayment is adequately discussed in the Opening Brief.

The remaining portion of the Reply Brief concerns matters which have already been touched upon above or which have been adequately treated in the Opening Brief.

Respectfully submitted,

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